



For a thriving New England

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January 21, 2016

Via Certified Mail, Return Receipt Requested

Mark E. Liberati, Esq.
Registered Agent
J & S Scrap Metal & Recycling, Inc.
1536 Westminster Street
Providence, RI 02909

Jeff Cadieux
President
J & S Scrap Metal & Recycling, Inc.
31 Water Street
Johnston, RI 02919

RECEIVED
JAN 25 2016
OFFICE OF THE REGIONAL ADMINISTRATOR

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (CLF)¹ hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Clean Water Act (the Act), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter (the Notice) constitutes notice pursuant to 40 C.F.R., part 135, of CLF's intention to file suit in United States District Court for the District of Rhode Island seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice.

The subject of this action is two-fold. First, J & S Scrap Metal & Recycling, Inc. (previously referred to as Winco Container Service and hereafter as J & S Scrap) is discharging stormwater directly associated with a scrap metal salvage and recycling facility located at 36 Starr Street, Johnston, RI 02919 (the Facility), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, J & S Scrap has failed to obtain coverage

¹ CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Narragansett watershed for, among other things, fishing, recreation, scenic/aesthetic and scientific purposes. CLF's membership includes people who live in or near the Narragansett watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF's members are adversely affected by the Facility's discharges of stormwater pollution to the receiving waters without a permit and in violation of the Clean Water Act.

under any Clean Water Act permit including the Multi-Sector General Permit (MSGP) issued under the Rhode Island Pollutant Discharge Elimination System² (RIPDES) by the state of Rhode Island for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

BACKGROUND

The main stem of the Simmons Brook (Waterbody ID RI0006018R-04) is a 2.8-mile waterway located in the Narragansett watershed. J & S Scrap discharges into Simmons Brook at multiple points throughout its length. Downstream of discharge points associated with J & S Scrap, the Simmons Brook flows into the Pocasset River (Waterbody ID RI0006018R-03A), which thereafter flows into the Pawtuxet River (Waterbody ID RI0006017R-03), and then into other water bodies located within the Narragansett watershed. The Environmental Protection Agency (EPA) has designated both the Simmons Brook and the Pocasset River as habitats for “fish, shellfish, and wildlife protection and propagation, aquatic life harvesting, and recreation.”³⁴

EPA has designated Simmons Brook as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.⁵ The Simmons Brook (Waterbody ID RI0006018R-04) is impaired for impaired biota (namely benthic macroinvertebrates) and pathogens (namely enterococcus bacteria).⁶ Stormwater, municipal discharges and sewage, and urban-related runoff have been identified as probable sources of impairments in Waterbody RI0006018R-04.

After along the edge of property owned by J & S Scrap, the Simmons River conflues with the Pocasset River. The Pocasset River is impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.⁷ The Pocasset River (Waterbody ID RI0006018R-03A) is impaired for chloride, copper, impaired biota (namely benthic macroinvertebrates), and pathogens (namely enterococcus bacteria). Stormwater is a probable source of impairments in Waterbody RI0006018R-03A.

² The Rhode Island MSGP is available at <http://www.dem.ri.gov/programs/benviron/water/permits/ripdes/pdfs/msgp.pdf>.

³ See 2014 Waterbody Report for the Simmons Brook & Tributaries, available at http://ofmpub.epa.gov/tmdl_waters10/attains_waterbody.control?p_au_id=RI0006018R-04&p_cycle=2014.

⁴ See 2014 Waterbody Report for the Pocasset River & Tributaries, available at http://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=RI0006018R-03A&p_list_id=RI0006018R-03A&p_cycle=2014.

⁵ See *supra* note 3.

⁶ *Id.*

⁷ See *supra* note 4.

EPA has designated the Pawtuxet River as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.⁸ The Pawtuxet River is impaired for impaired biota (namely benthic macroinvertebrates), cadmium, nutrients, mercury, and pathogens (namely enterococcus bacteria).⁹

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.¹⁰ Industrial activities, such as material handling and storage, equipment maintenance and cleaning, processing, reclaiming, and wholesale distribution of scrap and waste materials or other operations that occur at industrial facilities, may be exposed to stormwater.¹¹ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.¹²

J & S Scrap is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 2001, J & S Scrap has been required to apply for coverage under the MSGP by filing a Notice of Intent (“NOI”). On August 15, 2013, after expiration of the prior MSGP, the Rhode Island Department of Environmental Management issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2013 permit.¹³

J & S Scrap has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, J & S Scrap is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

J & S Scrap is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. J & S Scrap has operated the Facility since at least 2001, currently advertises as the operator of the Facility, and is registered with the Rhode Island Secretary of State Division of Business Services as the operator of the Facility.¹⁴ J & S Scrap and its agents and directors, including but not limited to Jeff Cadieux, president, have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the CWA.

⁸ See 2014 Waterbody Report for the Pawtuxet River Main Stem, *available at* http://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=RI0006017R-03&p_list_id=RI0006017R-03&p_cycle=2014.

⁹ *Id.*

¹⁰ See 40 C.F.R. § 122.26(b)(13).

¹¹ See 40 C.F.R. § 122.26(b)(14).

¹² See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

¹³ See MSGP I(C).

¹⁴ See

<http://ucc.state.ri.us/CorpSearch/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllowed=&FEIN=000117656>.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the scrap metal salvage and recycling facility (SIC 5093) located at 36 Starr Street, Johnston, RI 02919.

ACTIVITIES ALLEGED TO BE VIOLATIONS

J & S Scrap has engaged and continues to engage in “industrial activities,” and its operations fall under SIC 5093, within the meaning of 40 C.F.R. §§ 122.26(b)(14)(vi).¹⁵ Because the Facility has a primary SIC Code of 5093 and discharges stormwater associated with industrial activity, J & S Scrap is required to apply for, obtain coverage, and comply with the requirements of a discharge permit such as the MSGP.

J & S Scrap’s industrial activities at the Facility include, but are not limited to: dismantling and storage of vehicles, motors, appliances, heavy equipment, and metal wire; battery collection and storage; scrap metal storage; outdoor vehicle and equipment storage; vehicle and equipment maintenance; vehicle, equipment, and parts washing; and liquid storage. These activities are associated with a variety of pollutants, including but not limited to: oil and grease; ethylene glycol; heavy metals including copper, lead, and mercury; sulfuric acid; galvanized metals; aluminum; tin; petroleum hydrocarbons; suspended solids; arsenic; organics; chlorinated solvents; acid/alkaline wastes; phosphorus; salts; and fuel. The Facility is located approximately 100 feet updrift from the Simmons Brook.

Scrap metal salvage and other industrial activities and materials at the Facility are exposed to precipitation and snowmelt. Precipitation falls on and flows over the Facility, picking up pollutants associated with the Facility’s operations. The polluted runoff is then conveyed off-site via site grading, man-made collection systems and conveyances, and the operation of gravity into waters of the United States.¹⁶

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

¹⁵ See MSGP, Appendix B: Facilities and Activities Covered, Table VIII.N-1. Scrap Recycling and Waste Recycling Facilities (SIC 5093) facilities are subject to the requirements of the MSGP for stormwater discharges.

¹⁶ See 40 C.F.R. § 122.26(c)(1)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid discharge permit.¹⁷ J & S Scrap discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its facility into waters of the United States. Because J & S Scrap has not obtained coverage for these stormwater discharges under the MSGP or an individual RIPDES permit, it is illegally discharging stormwater without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).¹⁸ By failing to apply for and comply with the specific requirements of the MSGP, J & S Scrap is in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

a. J & S Scrap is discharging stormwater to waters of the United States without a permit.

J & S Scrap is an industrial discharger with a primary SIC Code of 5093, which means that pursuant to Section 402(p) of the Act, J & S Scrap is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because J & S Scrap has operated and continues to operate without a permit under Section 402(p), J & S Scrap is in violation of Section 301(a) of the Act.

In addition, during storm events, J & S Scrap's industrial activities at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches. There have been many such storm events since 2001. The Facility is generating and conveying pollutants from at least the following "point sources": vehicles and equipment left outdoors; vehicles driving on and off the Facility; and channels, ditches, discrete fissures, containers, and other conveyances to waters of the United States.¹⁹ Simmons Brook is considered a "water of the United States" as defined in 40 C.F.R. § 122.2, and therefore is a "navigable water" as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

b. J & S Scrap is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

¹⁷ 33 U.S.C. § 1311(a).

¹⁸ See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term "discharge of a pollutant" as "any addition of any 'pollutant' to 'waters of the State' from any 'point source'").

¹⁹ These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. Under 40 C.F.R. § 122.2 and MSGP Appendix A, "discharge of a pollutant" includes "surface runoff which is collected or channeled by man."

J & S Scrap is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.²⁰ The Facility has a primary SIC Code of 5093 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.²¹ J & S Scrap's failure to obtain coverage and comply with the permit conditions is in violation of the MSGP and 33 U.S.C. § 1342(p) of the Clean Water Act.²²

1) J & S Scrap Must Develop and Implement a Storm Water Management Plan (SWMP).

As a prerequisite to obtaining coverage under the MSGP, J & S Scrap must prepare a Storm Water Management Plan ("SWMP").²³ The SWMP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description and general location map, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.²⁴ J & S Scrap has failed to develop a SWMP in accordance with the MSGP's requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

2) J & S Scrap Must Submit to the Rhode Island Department of Environmental Management a Complete Notice of Intent to be Covered under the MSGP.

To be eligible to discharge under the MSGP, J & S Scrap must submit a complete Notice of Intent ("NOI") to the Director of the Rhode Island Department of Environmental Management (RIDEM).²⁵ J & S Scrap has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) J & S Scrap Must Take Control Measures and Meet Water-Quality Effluent Limitations.

²⁰ MSGP parts I and X.

²¹ See MSGP parts VIII(N).

²² A thorough search of EPA's facility databases shows no records and therefore no Clean Water Act permit coverage for J & S Scrap. See EPA Enforcement and Compliance History Online (ECHO), <http://echo.epa.gov/facilities/facility-search>; EPA Permit Compliance System (PCS) and Integrated Compliance Information System (ICIS), <http://www.epa.gov/enviro/facts/pcs-icis/search.html>. By contrast, searches of these databases for several other salvage yards throughout Rhode Island showed permit coverage.

²³ See MSGP part V.

²⁴ See MSGP part V(F).

²⁵ See MSGP part I(C)(1)(a).

To be eligible to discharge under the MSGP, J & S Scrap must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies.²⁶ J & S Scrap must address the selection and design considerations set forth in the MSGP, meet the non-numeric effluent limitations established by the MSGP, and meet limits contained in applicable permit effluent limitations guidelines.²⁷ These control measures must be in accordance with good engineering practices and manufacturer's specifications.²⁸ If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.²⁹ J & S Scrap has failed to cover the materials and operations that may result in polluted stormwater runoff. J & S Scrap has not implemented required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

4) J & S Scrap Must Conduct Routine Facility Inspections.

To be eligible to discharge under the MSGP, J & S Scrap must conduct routine inspections by qualified personnel, with at least one member of the Facility's stormwater pollution prevention team participating, of all areas of the Facility where industrial materials or activities are exposed to stormwater.³⁰ Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.³¹ These inspections must occur when the Facility is in operation.³² The schedule of these inspections must be included in the Facility's SWMP.³³ J & S Scrap has failed to conduct the required routine inspections in accordance with the MSGP's requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

5) J & S Scrap Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, J & S Scrap must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.³⁴ The MSGP requires different types of analytical monitoring (one or more of which may apply) including semiannual benchmark monitoring, annual effluent limitations guidelines monitoring,

²⁶ See MSGP part II(A).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See MSGP part IV(A).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See MSGP part VI.

and other monitoring as required by the Director.³⁵ An operator must monitor outfalls including each outfall identified in the SWMP covered by a numeric effluent limit.³⁶ Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.³⁷ Furthermore, because the Simmons Brook and the nearby Pocasset River are “impaired waters” under 33 U.S.C. § 1313(d), J & S Scrap must monitor for all pollutants for which Simmons Brook and the Pocasset River are impaired.³⁸ All monitoring data collected under the Permit must be reported to RIDEM no later than 31 days after the last day of the monitoring period for all monitored outfalls for the reporting period.³⁹ J & S Scrap has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to RIDEM in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) J & S Scrap Must Carry out Required Reporting and Recordkeeping.

J & S Scrap must maintain and submit any and all required monitoring data.⁴⁰ Such monitoring data includes the following: an annual report to RIDEM which includes the Facility’s findings from the annual comprehensive site inspection and any documentation of correction actions;⁴¹ an Exceedance Report to the Department no later than 30 days after receipt of the lab results if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;⁴² and any other required reports under the MSGP.⁴³ J & S Scrap has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

7) J & S Scrap Must Comply with the Requirements of MSGP Subpart N.

J & S Scrap must also comply with the sector-specific requirements contained in Subpart N of the MSGP.⁴⁴ Subpart N requires scrap metal recycling and salvage yards to implement additional technology-based effluent limits,⁴⁵ meet additional SWMP and inspection requirements,⁴⁶ and monitor stormwater discharges for compliance with the benchmark limitations applicable

³⁵ See MSGP part VI(B).

³⁶ See MSGP part VI(A)(1).

³⁷ See MSGP part VI(A)(3).

³⁸ See MSGP part VI(B)(3).

³⁹ See MSGP part VII(A).

⁴⁰ See MSGP part VII(A).

⁴¹ See MSGP part VII(B).

⁴² See MSGP part VII(C).

⁴³ See MSGP part VII(D).

⁴⁴ See MSGP, Appendix B, Table B-1, Sector N; MSGP part VIII(N).

⁴⁵ See MSGP parts VIII(N-1).

⁴⁶ See MSGP parts VIII(N-1).

specifically to scrap metal recycling and salvage yards.⁴⁷ J & S Scrap has failed to comply with the additional requirements of Subpart N of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which J & S Scrap operates its Facility without general permit coverage or discharges stormwater from the Facility without a permit is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

Each day on which J & S Scrap operates its Facility without individual permit coverage or discharges process water from the Facility without a permit is a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

J & S Scrap has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day, since at least 2001, on which there has been a measurable precipitation event.

Every day, since at least 2001, on which J & S Scrap has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

Every day, since at least 2001, on which J & S Scrap has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of an individual RIPDES permit is a violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

These violations are ongoing and continuous, and barring a change in the stormwater management controls and process water controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

J & S Scrap is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects J & S Scrap to a penalty up to \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to \$37,500 per

⁴⁷ See MSGP part VIII(N-1).



day for each violation that occurred after January 12, 2009.⁴⁸ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring J & S Scrap to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Max Greene within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,

A handwritten signature in dark ink, appearing to read "Max Greene", is written over a horizontal line.

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⁴⁸ 40 C.F.R. § 19.2.



cc:

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